82855-5
No. 26124-7--III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Appellant,

vs.

JOSE JUAN MONTANO

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases:

Statutes

I. IDENTITY OF RESPONDENT

Jose Juan Montano is represented by Jeff Goldstein, and is the Respondent.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. The trial court's interpretation of State v. Burke; State v. Stephenson; and RCW 9A.76.180 Intimidating a Public Servant, was correct.

B. The threshold of what constitutes intimidating a police officer should be greater than witnesses, jurors, and judges.

C. The trial court properly dismissed the charge of intimidating a public servant pursuant to State v. Knapstad, because there was no evidence of the respondent making an attempt to influence or persuade Officer Smith in his official capacity as a public servant.

III. STATEMENT OF THE CASE

Facts

On February 25th, 2007, Officer Darren Smith of the Quincy Police Department witnessed the respondent, Jose Montano, shove his brother, Salvador Montano, while at the intersection of B Street SW and First Street SW. CP 18. The accuser told Officer Smith that the respondent had hit him. Officer Smith requested that the respondent identify himself, and he refused. CP 18. The respondent became verbally abusive and walked away, despite being ordered to come back. CP 18. Officer Smith attempted to restrain the respondent, but the respondent shoved back. Officer Smith told the respondent that he was under arrest for assault 4th – domestic violence. CP 18. The respondent continued to struggle with Officer Smith. Sgt. Jones arrived on the scene, and told the respondent twice to stop or he would be tased. CP 18. The respondent was than tased. He continued to struggle, and was tased a second time. CP 18. It was then that the respondent was handcuffed. CP 18. The respondent said to Officer

Smith on the way to the patrol car: "I know when you get off work, and I will be waiting for you;" "I'll kick your ass;" "I know you are afraid, I can see it in your eyes;" "punk ass." CP 18.

Once in the patrol car, the respondent continued the taunts, such as: "You need to retire; I see your grey hair;" and that Officer Smith was scared. CP 18. Officer Smith stated in his report that he could see the respondent in his rear view mirror during the entire trip to the Grant County Jail, "with a glaring focus" and laughing in a menacing manner. CP 18. In addition to the assault in the fourth degree – domestic violence charge, the respondent was charged with resisting arrest, a misdemeanor, and intimidating a servant, a class B felony. CP 18.

Nature of the Action

In Grant County Superior Court No. 07-1-00116-9, the defendant Jose Juan Montano was charged with intimidating a public servant, resisting arrest, and assault in the fourth degree – DV. CP 1-2. The Honorable Evan Sperline ruled that there was not probable cause for the intimidating a public servant charge. RP February 26, 2007 at 4, In. 8-9.

The Defendant made a pre-trial motion to dismiss under State v. Knapstad. CP 8-22. The State filed a written response. CP 23-26.

The defense argued that for intimidating a public servant to be a valid charge, there must be a true threat, and the defendant had to try to influence the public servant out of doing his official capacity. CP 18. The defense

also argued that the case law supports the notion that the "threat" itself, cannot be the only evidence that tries to persuade the public official. CP 18.

The trial court asked the State what evidence was there showing that the "purpose of the threat was to get the officer to turn the defendant loose or change his mind about arresting him..." RP April 17, 2007 at 5-6. The State responded that the purpose of the threat was to gain release. RP April 17, 2007 at 6. The State explained that the only thing that the defendant could have been responding to was the arrest and this was amply evidenced by his resisting arrest. RP April 17, 2007 at 6. The State said that the defendant never asked to be released; it was implied by his threat. RP April 17, 2007 at 6. However, when the respondent made the threats to the officer, he no longer was trying to resist being arrested. CP 18.

The trial court ruled that while the defendant "was angry, belligerent, and resisting ..." the State was "unable to show that his threat was intended to persuade the officer to do or not do something." RP April 17, 2007 at 9, LN 19-22. The trial court then quoted from State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006), and said, "Evidence of anger alone is insufficient to establish intent to influence the officer's behavior." RP April 17, 2007 at 9, LN 13-14. The court then said that the evidence that was available in the present case is similar to the evidence available in Burke. RP April 17, 2007 at 9, LN 16-18. There were only threats of harm made by the defendant, but there was no evidence that the defendant tried to

persuade the officer out of doing his official duty. The trial court dismissed the charge of intimidating a public servant. RP April 17, 2007 at 9.

The remaining counts were dismissed by the State in order to prevent multiple trials while facilitating the appeal. CP 27-28. The State is appealing the dismissal of the intimidating a public servant charge. CP 26.

V. ARGUMENT

A. THE TRIAL COURT'S INTERPRETATION OF STATE V. BURKE, STATE V. STEPHENSON, AND RCW 9A.76.180, INTIMIDATING A PUBLIC SERVANT, WAS INTREPRETED PROPERLY.

THE DEFENDANT MADE A "TRUE THREAT".

According to RCW 9A.76.180, intimidating a Public Servant consists of the following elements;

(1) A person is guilty of intimidating a public servant if, by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.
(2) For purposes of this section "public servant" shall not include jurors.
(3) "Threat" as used in this section means;
(a) to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
(b) threats as defined in *RCW 9A.04.110(26).
(4) Intimidating a public servant is a class B felony.

There are two necessary elements to committing the crime of Intimidating a Public Servant: 1) making a threat; and, 2) the attempt to influence the official action of a public servant. The threat must be a "true threat." True threats are unprotected speech under the first amendment. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Actual intent to carry out the threat is unnecessary to fulfill the threat element of the statute. Id at 46. Washington

uses an objective standard in determining what constitutes a true threat, that being "... a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of an intention to inflict bodily harm upon or to take the life of (another individual)." State v. Johnson, 156 Wn.2d 355, 361, 127 P.3d 707 (2006); State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

A true threat is a serious threat, not one said in a joking manner, small talk, or political argument. Johnson, 156 Wn.2d at 361; Kilburn, 151 Wn.2d at 43. The courts and legislature "...have targeted only threats of 'substantial harm' that are designed to 'influence a public servant's vote, opinion, decision, or other official action as a public servant,' the challenged portion of the statute is narrowly tailored to address the overall problem it seeks to correct. RCW 9A.76.180; RCW 9A.04.110 (26)(j). It prohibits only those threats related to future decision making and to substantial interests. It does not encompass threats of harm based upon past decisions. Nor does it prohibit minor injury to the official's financial situation or other protected interests." State v. Stephenson, 89 Wn.App. 794, 804, 950 P.2d 38 (1998).

THE PRESENT CASE IS ON POINT WITH *STATE V. BURKE*

In State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006), the defendant was convicted of assault in the third degree, and intimidating a public servant. A police officer was called to a house party where there appeared to be numerous underage drinkers outside in front of the residence.

The officer chased them into the house, and eventually went outside, on the back deck. There were approximately 50 people with beer bottles on the deck, who became angry and started yelling profanities at the officer. The officer tried to leave, but the crowd closed in around him preventing him from leaving. At that point, the defendant charged the officer, belly bumping him, and nearly knocking the officer off of his feet. The officer pushed the defendant back. The officer testified that the defendant's demeanor was "enraged." The defendant yelled profanities and fighting threats at the officer, although the officer couldn't remember the exact words used. The defendant then got into a fighting stance with closed fists, while standing a mere two feet away. The defendant then took a swing at the officer with a closed fist. The officer parried the punch, and in the same motion turned the defendant around, and pushed him through the crowd and off of the deck. The officer struggled with the defendant, and then finally handcuffed him. State v. Burke, 132 Wn.App. 415, 132 P.3d 1095 (2006).

The Burke court reversed the intimidating a public servant conviction. The Burke court stated that while the initial contact with the defendant and the fighting stance was substantial evidence that a threat existed, there was no direct evidence that the defendant tried to influence the officer. Burke, 132 Wn.App. 421. The Burke court stated that the physical attack and threats were not an attempt to communicate that the officer take a certain course of action, and that simple anger does not imply an attempt to influence. "Evidence of anger alone is insufficient to establish intent to influence Billing's (the officer)

behavior. The state must show that Burke's anger had some specific purpose to make Billings do or not do something." State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006).

The appellant is incorrect when arguing in their brief that the facts of the present case are inapposite. The appellant's rationale was that in Burke, the officer was no longer attempting to arrest underage drinkers, so the officer was not operating in an official capacity. App. Brief 13. While in the present case, Officer Smith was still operating in an official capacity, because he was attempting to arrest, transport, and charge the defendants when the threats were made. CP 18. The officer in Burke was still on duty when he was assaulted and then threatened. Burke, 132 Wn.App. 421. In the present case, fighting threats like "I'll kick your ass" were made to the Officer after the respondent was handcuffed and arrested. CP 18.

However, the Burke court stated the following, "But threats are not enough; the defendant must attempt to influence the public servant's behavior with these threats." State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006) (citing State v. Stephenson, 89 Wn.App. 794, 807, 950 P.2d 38 *review denied,* 136 Wash.2d 1018, 966 P.2d 1277 (1998).

In the present case, statements like, "I'll be waiting until you get off of work" and "I'll kick your ass" can be viewed as a threat. CP 18. However, according to Stephenson and Burke, that would not be enough to satisfy all of the elements of the Intimidating a Public Servant statute. Threatening words by themselves do not violate the statute: There must be an

attempt by the respondent to influence the official action of the police officer. State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006) (citing State v. Stephenson, 89 Wn.App. 794, 807, 950 P.2d 38 *review denied,* 136 Wash.2d 1018, 966 P.2d 1277 (1998).

The respondent never attempted to influence Officer Smith from doing his job. The respondent was angry, but similar to Burke, there was no evidence that the respondent was trying to influence Officer Smith from doing or not doing his official duty.

The appellant argues that based on the respondent's prior behavior, resisting arrest and having to be tased, that there can be no other way to interpret the threats made except that the respondent wanted to be released. App. Brief at 20. However, the statute only prohibits threats of future decision making and does not include threats of harm based on past decisions. State v. Stephenson, 89 Wn.App. 794, 804, 950 P.2d 38 (1998). At the time that the respondent made the threats, he no longer was resisting arrest.

The appellant argues "that the essence of intimidation is subtlety." App. Brief 14. The appellant has overlooked the not so subtle reasoning in Burke, that "evidence of anger alone is insufficient to establish intent to influence Billing's (the officer) behavior. The State must show that Burke's anger had some specific purpose to make Billings do or not do something." State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006). The appellant never put forth any evidence that the respondent was attempting to influence the official action of the police officer. The only evidence presented by the appellant was

that the respondent made threats, and that he was angry. According to Burke, that does not meet the threshold of an intimidating a public servant charge.

THE APPELLANT'S HYPOTHETICALS ARE INAPPOSITE.

The appellant used the following hypothetical in the appellant brief: "When a robber holds a gun on a cashier, neither the threat to shoot nor the demand for money requires words." App. Brief at 14. The issue isn't whether or not a threat has been verbalized or implied. The issue is: Is the specific purpose of the threat to inhibit the public servant from fulfilling some aspect of his official capacity as a public servant? In the appellant's hypothetical, even if the cashier was a public servant, it's irrelevant to the present case. A defendant trying to rob a public servant by holding a gun to his head has the intent to influence that public servant in his official duty: He is actually robbing them. He is making both a threat and following through with that threat. That defendant is in a position of power. He has taken action toward persuading the public servant from fulfilling some aspect of his duty as a public servant.

Another example cited by the appellant comes from United States v. Balzano, 916 F.2d 1273 (7th Cir. 1990), where a defendant was convicted of intimidating a grand jury witness. App. Brief at 17. Right before the witness was going to testify before the grand jury, the defendant made a slashing motion across his throat, and then used his finger and pointed it like a gun as if firing it. App. Brief at 17.

The death threat made by the defendant immediately prior to the witness testifying is distinguishable from the present case, because the witness had not yet testified. In the present case, the defendant had already been arrested, handcuffed, and was being escorted to the officer's patrol car when he made the threats. However, the respondent did not take the next necessary step of attempting to influence Officer Smith out of fulfilling his official capacity as a police officer.

B. THE THRESHOLD OF WHAT CONSTITUTES INTIMIDATING A POLICE OFFICER SHOULD BE GREATER THAN WITNESSES, JURORS, AND JUDGES.

The appellant used the following hypothetical, "when a defendant looks at a witness or a juror and draws his finger across his throat, no words need communicate the meaning." App. Brief at 14. Intimidating a juror or witness is different than the intimidating a police officer. Jurors and witnesses are lay people. The respondent believes that the threshold for intimidating a lay person should be lower than a intimidating a police officer. Police officers are professionals. They have been through rigorous training at the police academy. They have been trained to deal with angry, belligerent people on a daily basis.

The Burke court made a wise decision in ruling that when a defendant is both angry and making threats, that alone cannot be perceived as the defendant attempting to influence the official action of the police officer. State v. Burke, 132 Wn.App. 415, 422, 132 P.3d 1095 (2006).

If this court follows the appellant's reasoning of how to define "persuading a police officer from fulfilling their official duty," a zero tolerance policy would be in place. For example, in the present case, the respondent was arrested for a gross misdemeanor and a misdemeanor, relatively minor offenses in the world of criminal offenses. The misdemeanors were the underlying cause of the arrest. The intimidating a public servant charge came after the respondent was arrested. The appellant's interpretation of intimidating a public servant would lower the threshold for defendants getting charged with a class B felony, when the underlying charge was a misdemeanor. Defendants that are arrested for misdemeanor charges could now be facing significant jail/prison time and a felony charge, for making a threat as they are being arrested.

Police officers are trained to diffuse stressful situations. The expectation of a police officer is that part of the job is dealing with verbal abuse. Police officers have made an implied compact that they will be tolerant of a certain amount of verbal abuse. They deal with an array of difficult people on a daily basis: People that are high/intoxicated; mentally ill; frightened or embarrassed because they were arrested, etc. The appellant wants there to be a zero tolerance policy for any threatening words when people are being arrested, even though when someone is arrested, they are typically in a stressful, vulnerable position, and are not necessarily thinking clearly.

When taking into consideration an intimidating a public servant charge, there should be some latitude for defendants at the point of arrest and while they are being taken to the county jail. Not every word that comes out of a

defendant's mouth at the point of arrest should be automatically considered an attempt to persuade or influence an officer out of their official duty. Most people arrested are not going to be charged with a felony. They are going to be charged with misdemeanors or infractions. By having a zero tolerance policy, there will be a greater chance that police contact of minor consequence will now turn into a class B felony.

Compare a defendant that was arrested and having a hostile conversation with the arresting officer, to a defendant that is having the same conversation with a witness, juror or judge. Once arrested and arraigned, the defendant typically has cooled down and has more of an ability to think clearly. Most likely, the defendant has spoken to an attorney before having contact with a juror, witness or a judge. The defendant that attempts to intimidate a witness, juror, or judge, has typically made a calculated decision to do so. This is a very different scenario than someone who has just been arrested, and begins making threats in the heat of the moment. Threats made at the point of arrest and when a defendant is being taken to jail are more of an emotional type of response.

C. JUDGE SPERLINE APPLIED THE PROPER STANDARD AT THE KNAPSTAD MOTION WHEN HE DISMISSED THE INTIMIDATING A PUBLIC SERVANT CHARGE.

In criminal cases, defendants may challenge the sufficiency of the evidence: (1) before trial, State v. Knapstad, 107 Wn. 2d 346, 356-57, 729

P.2d 48 (1986); (2) at the end of the state's case in chief, State v. Sunset Quarries, Inc., 66 Wn.2d 700, 701, 404 P.2d 786 (1965); (3) at the end of all the evidence, State v. Brown, 55 Wn. App. 738, 742, 780 P.2d 880 (1989), review denied, 114 Wn.2d 1014, 791 P.2d 897 (1990); (4) after the verdict, CrR 7.4 (a)(3); and (5) on appeal, State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). When a defendant brings a pre-trial Knapstad motion to dismiss, the trial court has the inherent authority to dismiss the criminal charges if the undisputed facts are insufficient to support a finding of guilt. Knapstad, 107 Wn.2d at 351. A trial court's Knapstad dismissal will be upheld if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Wilhelm, 78 Wn. App. 188, 191, 896 P.2d 105 (1995).

In order to survive a Knapstad motion, the state must provide a prima facie case of guilt. State v. Dunn, 82 Wn. App. 122, 125-26, 916 P.2d 952 (1996). If the undisputed facts fail to make a prima facie case of guilt beyond reasonable doubt, the trial court must dismiss the charges. Id.

In the present case, Judge Sperline stated, "The State has perfectly shown that Mr. Montano was angry, belligerent, resisting and, threatening, but is unable to show that his threat was intended to persuade the officer to do or not do something." RP April 17, 2007 at 9, LN 18-22. In other words, Judge Sperline is saying that the State did not put forth all of the essential elements beyond a reasonable doubt of the crime of intimidating a public servant. This is exactly what Knapstad is supposed to do. The appellant agrees that there

were no new facts used, just the officer's report. App. Brief at 5. The appellant's argument that Judge Sperline failed to apply the proper standard for a Knapstad motion is meritless.

CONCLUSION

The threats made by Mr. Montano are only one element of the intimidating a public servant statute. He never attempted to influence Officer Smith from acting in his official capacity. The trial court's ruling on dismissing the intimidating a public servant charge should be upheld.

Based upon the foregoing legal argument, the Respondent respectfully prays this Court to uphold the April 17, 2007 ruling on dismissing the intimidating a public servant charge as a matter of law.

DATED this November 7th, 2007.

Respectfully Submitted,

Jeff Goldstein

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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, vs. JOSE MONTANO, Respondent,	No. 261247 STATEMENT OF ADDITIONAL AUTHORITIES

Comes now, Jose Montano, by and through his attorney of record, Jeff Goldstein, and notifies the Court and opposing counsel of the following additional authorities pursuant to RAP 10.8:

State v Brown, __ Wn.2d. __, 173 P.3d 245, (No. 77885-0 December 13th, 2007). The court held that the mere threat by the defendant was not necessarily an attempt by the defendant at influencing the witness, on an intimidating a witness a witness charge.

DATED this 24th day of January, 2008.

Respectfully submitted,

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